IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ELEFTHERIOS "TED" PASTROUMAS,	:	APPEAL NO. C-150352 TRIAL NO. A-1401279
Plaintiff-Appellant,	:	*O P I N I O N.*
vs.	:	
UCL, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 26, 2016

Clements Taylor Butkovich & Cohen, *William E. Clements* and *Catharin R. Taylor*, for Plaintiff-Appellant,

Frost Brown Todd LLC, *Richard L. Moore* and *Matthew O. Wagner*, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Plaintiff-appellant Eleftherios "Ted" Pastroumas was injured in a fall that occurred while he was working on a bridge-painting project for his employer, defendant-appellee UCL, Inc., ("UCL"). He filed a complaint against UCL, alleging that it had committed an intentional tort against him under R.C. 2745.01. The trial court granted UCL's motion for summary judgment. We affirm the trial court's judgment.

I. Facts and Procedure

{¶2} UCL is a contractor specializing in stripping, painting, and coating bridges. Pete Kontopos and his wife have owned the company, or a predecessor company, for over 20 years. UCL contracted with the Ohio Department of Transportation ("ODOT") to repaint a number of bridges, one of which was an overpass where State Route 50 crosses over Red Bank Road.

{¶3} Pastroumas had been employed in the bridge-painting industry for a number of years, including five years at UCL. Kontopos knew the Pastroumas family personally because Pastroumas's father had worked with Kontopos for many years. Pastroumas was knowledgeable about bridge painting and got along well with his supervisors and coworkers.

{¶4} Before the accident, Pastroumas had been working at a different UCL site. He requested a transfer to the Red Bank job because he was unhappy with how the other job was progressing and because the Red Bank job was closer to his house. He had previously worked with the foreman on that job, Andy Pragalos, and had gotten along well with him. On the day he was injured, Pastroumas had only been at the Red Bank job site for a couple of days.

A. Erecting the Platform and Safety Concerns

{¶5} On June 9, 2012, the day of the accident, UCL was erecting a containment platform under the bridge in a way that was typical in the industry. UCL employees made the platform by stretching high-tension steel cables across the underside of the bridge. They then lowered rolls of chain-link fencing onto the cables from above. They unrolled the chain-link fencing and secured it to the cables, forming a stable surface. This process was repeated with multiple rolls of fencing until the platform was complete.

{¶6} UCL used "outriggers," to extend the working platform beyond the face of the bridge, which was also a common practice in the industry. Kontopos constructed the outriggers himself out of three-inch square metal tubing, one-quarter inch thick. He welded a bracket onto each ten-foot metal tube so that it could be clamped to an I-beam or girder beneath the bridge. The cables on the outer edge of the bridge were attached to the outer end of each outrigger by a shackle that Kontopos had also welded. Once the outriggers and cables were installed, the cable that ran through the shackle at the end of the outrigger was tightened so that the cable was under high tension. This process was completed before Pastroumas arrived at the Red Bank job site.

{¶7} Because the Red Bank job was an ODOT project, the work had to comply with various requirements. One of those requirements was that the company had the duty to prepare a platform/containment system according to the drawings of a registered engineer, which had to bear the engineer's stamp. The company was also required to comply with all safety rules of the Occupational Safety and Health Administration ("OSHA") and the Industrial Commission of Ohio.

{¶8} ODOT required that one of its inspectors be present during all work on the project. The inspector for the Red Bank Road project was Kenneth Fathauer. His job was to ensure that UCL complied with the ODOT requirements. He was prohibited

from climbing onto the platform until engineer drawings for the system were produced and he saw that the system was in compliance with those drawings.

{¶9} Before the start of the project, UCL had delivered the outriggers to the Red Bank job site. Fathauer immediately became concerned that the outriggers were undersized. He reported this concern to Kontopos, Pragalos, and his supervisor, the ODOT project engineer. Fathauer insisted on seeing the engineer's drawing so that he could determine whether a registered engineer had evaluated the outriggers.

{¶10} On June 5, 2012, Fathauer met with Kontopos at his office, at which time Kontopos showed him the engineer's drawing that purportedly showed the platform system that UCL was erecting above Red Bank Road. This drawing, which was stamped June 1, 2012, was created by Ed Evers, a registered engineer. Fathauer immediately saw that the outriggers being installed on the project did not comport with the dimensions set out in the drawing.

{¶11} The outriggers created by Kontopos were undersized and less sturdy than those depicted in Evers's drawing. Fathauer was also concerned that the brackets on Kontopos's outriggers were not gusseted for extra strength as depicted in the drawing. According to Fathauer, the gussets designed by Evers would have supported the bracket on the outrigger to prevent bending. Finally, Fathauer expressed concern that the parapet hooks that would have supported the outrigger from the bridge above, which were depicted in the drawing, were not installed on the outriggers. Though Fathauer expressed these concerns to Kontopos, Kontopos told him that he "should not worry about it" and that Kontopos would get new drawings.

{¶12} Kontopos stated that he had deliberately chosen to vary the size and specifications of the outriggers used on the Red Bank Road job from the design mandated in Evers's drawing. He said that Evers's design was "basically generic," so that he could use identical drawings on different jobs, and that he had used the same

outriggers for a number of years. Evers stated that each ODOT job needed to have a specific design drawing and stamp by a registered engineer and that the failure to adhere to that requirement was dangerous.

{¶13} Despite Fathauer's continued statement of concern, UCL continued using the outriggers. On June 9, 2012, UCL had Pastroumas and his coworker lay the chain link fence over the previously erected outriggers and cables. The fencing, which was to be laid in rows overlapping each other, would form the undersurface of the containment system and provide a work area for the painters. It would be enclosed by tarpaulins to prevent the metal grit being used to sandblast the bridge from entering the environment.

{¶14} The first row of chain-link fence was installed by workers in two man-lifts, one on each side of the bridge. Workers on top of the bridge rolled the fencing down to the workers in the man-lifts. After they installed the first row, the workers could not use the man-lifts because the fencing blocked access to the underside of the bridge. At that point, a worker had to climb onto the fencing to complete the installation of additional rows. Pastroumas was assigned this responsibility on the day of the accident.

B. The Accident

{¶15} When he arrived at the jobsite in the morning, Pastroumas had brought his own safety harness and hard hat. UCL gave him fall protection, which consisted of two metal wire chokers and two retractable fall-prevention devices ("retractables"), which were inadequate to protect him at all times while he was installing the platform.

{¶16} Pastroumas climbed from the man-lift onto the installed fencing, which was about 18 feet above the surface of the road below. He attached a choker and a retractable to the beams above. Workers in one of the man-lifts would get the fencing

supplied from above and feed it to Pastroumas, who would pull it over to the man-lift on the other side of the bridge.

{¶17} While he was working, Pastroumas used the two chokers and two retractables that UCL had given him. He would wrap the choker around an exposed beam on the underside of the bridge and secure it by tightening the clamps. He would then attach one end of the retractable to the choker and the other to his own safety harness.

{¶18} Chokers could only be used when they could be wrapped completely around a beam. Many of the beams did not allow the use of a choker, because they were attached to the underside of the bridge. Additionally, the retractables only allowed approximately 12 feet of extension. As the work progressed, Pastroumas would frequently reach their outer limits. When that occurred, he would remove the choker from the beams by unscrewing the clamps and move the choker to the new location. He would then reattach the retractable to the choker and his harness. While doing so, the only fall protection he had was the platform on which he stood.

{¶19} When he could not connect the retractable to a beam, Pastroumas attempted to lessen the risk by attaching it to the cables supporting the platform, which was not acceptable under OSHA safety requirements. Although Pastroumas was concerned about his safety during the moments when the retractables were not attached to a beam, he believed that the platform was properly engineered and would protect him. He also felt that he would be disciplined or lose his job if he objected.

{¶20} Immediately before his fall, Pastroumas was in a position where he found it impossible to connect his retractable to a beam, so he once again connected the retractable to the cables supporting the platform. As he did so, a coworker lowered a role of fencing weighing 400 pounds onto one of the outriggers. The outrigger brackets bent under the weight of the fencing, and the outrigger separated from the beams to

which it was attached. At that time, it was supported only by the cabling. The platform sagged, and the outer cable suddenly snapped, leaving Pastroumas with no fall protection at all. The cable struck Pastroumas on the leg and caused him to somersault face first toward the ground. He suffered numerous injuries including skull and spinal fractures.

{¶21} Fathauer saw Pastroumas fall and called 911. Emergency personnel and an OSHA inspector arrived a short time later. UCL employees attempted to remove the outriggers from the site, but were stopped by police officers so that OSHA could inspect them.

C. A History of OSHA Violations

{¶22} Prior to Pastroumas's injury, UCL had a long history of OSHA violations. It had received numerous citations, many of which involved the failure to provide adequate fall protection, the failure to erect platforms that were designed by a registered engineer, and the use of inferior materials for the containment system. A number of the violations were classified as "serious," "willful" and "repeat." Further, in 2009, another UCL employee, Edward Gourdon, had died from a fall at a jobsite. Numerous OSHA citations resulted from that death. Gourdon's estate also filed a suit alleging an intentional tort against UCL and the allegations included that UCL had failed to provide proper fall protection and had improperly designed the platform/containment system.

II. Standard of Review

{¶23} Pastroumas presents two assignments of error for review, which we address out of order. In his second assignment of error, he contends that the trial court erred in granting UCL's motion for summary judgment. He argues that genuine issues of material fact existed as to whether UCL had the specific intent to injure. This assignment of error is not well taken.

{¶24} An appellate court reviews a trial court's ruling on a motion for summary judgment de novo. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Evans v. Thrasher*, 1st Dist. Hamilton No. C-120783, 2011-Ohio-4776, ¶ 25. Summary judgment is appropriate if (1) no genuine issue of material fact exists for trial, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his or her favor. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); *Evans* at ¶ 25.

III. Intentional Torts Generally

{¶25} R.C. 2745.01 governs an employer's liability for intentional torts. It provides in pertinent part:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

{¶26} The General Assembly enacted this statute in answer to previous Ohio Supreme Court cases in which the court had allowed an employee to recover for an intentional tort if an injury was "substantially certain" to occur. *Stetter v. R.J. Corman*

Derailment Serv., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 23-28. Its intent was to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 56; *Knight v. Proctor & Gamble Co.*, 1st Dist. Hamilton No. C-110593, 2012-Ohio-6370, ¶ 13. This standard is difficult to meet because an intentional-tort claim is intended to be a narrow exception to the workers' compensation system's prohibition against an employee's ability to sue his or her employer for a workplace injury. *Knight* at ¶ 13.

{¶27} In *Kaminski* and *Stetter*, the Ohio Supreme Court found R.C. 2745.01 to be constitutional. *Kaminski* at ¶ 1-2; *Stetter* at ¶ 1. The court noted that the previous "substantial-certainty" standard had been recognized only by a few states, and that R.C. 2745.01 "appears to harmonize the law of this state with the law that governs a clear majority of jurisdictions." *Kaminski* at ¶ 99. It further stated,

> The common-law liability of the employer cannot * * * be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate attempt directed to the purpose of inflicting an injury.

Id. at ¶ 100, quoting 6 Larson, *Workers' Compensation Law*, Section 103.03 (2008).

{¶28} The Ohio Supreme Court has continued to interpret the statute as a narrow exception to the general rule that most workplace injuries are covered exclusively by workers' compensation. In *Houdek v. Thyssenkrupp Materials, N.A.*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, it stated that "R.C. 2745.01 embodies the General Assembly's intent to significantly curtail an employee's access to common-law damages for what we will call a 'substantially certain' employer intentional tort." *Id.* at ¶ 23, quoting *Stetter* at ¶ 27. The court further stated that "absent a deliberate intent

to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *Houdek* at ¶ 25. It most recently reiterated the same principles in *Cincinnati Ins. Co. v. DTJ Ent. (In re Hoyle)*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.2d 122, ¶ 2-12.

IV. Failure to Prove Deliberate Intent to Injure

{¶29} This case does not implicate R.C. 2745.01(C), which provides for a rebuttable presumption of intent in the case of a deliberate removal of a safety guard. *See Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 1-3; *Knight*, 1st Dist. Hamilton No. C-110593, 2012-Ohio-6370, at ¶ 14-23. Therefore, to recover under R.C. 2745.01(A) and (B), Pastroumas had to prove that UCL acted with specific intent to injure. *See Hoyle* at ¶ 10; *Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶ 55. He has failed to meet that burden as a matter of law. While we may agree that UCL's conduct was egregious and reckless as to the safety of its employees, that is not the standard for determining an intentional-tort claim. Pastroumas failed to prove that his employer had a specific intent to injure.

{¶30} A number of courts, including this one, have previously found that the failure to provide proper fall or other safety protection or to adhere to OSHA regulations does not create a genuine issue of fact as to whether the employer committed an intentional tort absent proof of a deliberate, conscious attempt to injure. *See Head v. Reilly Painting & Contracting, Inc.*, 2015-Ohio-688, 28 N.E.3d 126, ¶ 3-13 (8th Dist.); *Wright v. Mar-Bal, Inc.*, 11th Dist. Geauga No. 2012-G-3112, 2013-Ohio-5647, ¶ 28; *Schiemann v. Foti Contracting L.L.C.*, 8th Dist. Cuyahoga No. 98662, 2013-Ohio-269, ¶ 24; *Knight* at ¶ 29-31; *McCarthy v. Sterling Chemicals, Inc.*, 193 Ohio App.3d 164, 2011-

Ohio-887, 951 N.E.2d 441, ¶ 13-15 (1st Dist.). We agree with the Eighth Appellate District when it stated:

> We disagree with [the Ninth Appellate District's] analysis of the employer intentional tort standard because it, like the estate in this case, improperly equates the deliberate denial of safety equipment to an employee as showing a deliberate intent to injure. The fallacy of this position is that it relies on the proposition that but for the issuance of safety equipment, an injury is substantially certain to occur. The proposition that an injury is substantially certain to occur is not equivalent to the proposition that a person acted with deliberate intent to injure. While it may be true that safety equipment might prevent an injury, that says nothing about the employer's intent to harm an employee.

Head at ¶ 11.

{¶31} Pastroumas relies on *Cantu v. Irondale Indus. Contrs.*, 6th Dist. Fulton No. F-11-018, 2012-Ohio-6057, in which the court discussed the term "intent" as used in R.C. 2745.01(A) and (B) and analyzed it using general tort principles. It distinguished between motive and intent, stating that the word "intent" is used to "denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to occur or result from it." *Id.* at ¶ 22, quoting 1 Restatement of the Law 2d, Torts, Section 8(A) (1965). It further stated that "[w]hen the legislature redefined 'substantially certain' to mean 'deliberate intent,' the only thing added to this equivalency was the adjective 'deliberate,' meaning 'to carefully consider * * * characterized by awareness of the consequences.' " *Id.* at ¶ 24, quoting *Merriam Webster's Collegiate Dictionary* 305 (10th Ed.1996).

{¶32} We disagree because we believe the court's holding in *Cantu* is directly contrary to the Ohio Supreme Court's pronouncements that R.C. 2745.01 requires the employee to show deliberate intent to injure. The legislature has unequivocally rejected the substantial-certainty standard that the *Cantu* court attempted to read into the statute. As the Ohio Supreme Court stated in *Houdek*, "an employer's 'knowingly permitting a hazardous work condition to exist [and] knowingly ordering employees to perform an extremely dangerous job * * * falls short of the kind of actual intention to injure that robs the injury of accident character.' " *Houdek,* 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, at ¶ 24, quoting 6 Larson, *Workers' Compensation Law*, Section 103.03, 103-7 to 103-8 (2001). *See Spangler v. Sensory Effects Powder Sys., Inc.*, N.D.Ohio No. 3:15 CV 75, 2015 U.S. Dist. LEXIS 70427, *2-4 (June 1, 2015).

{¶33} We find no genuine issues of material fact. Construing the evidence most strongly in Pastroumas's favor, reasonable minds could come to but one conclusion—that UCL did not act with the intent to injure. UCL was entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in its favor. *See Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267; *Evans*, 1st Dist. Hamilton No. C-120783, 2013-Ohio-4776, at ¶ 25. Consequently, we overrule his second assignment of error.

{¶34} In his first assignment of error, Pastroumas contends that the trial court erred in failing to consider circumstantial evidence. The trial court stated, "So can you consider circumstantial evidence? The law, in my opinion, is not really clear if you can." We agree that the law is not clear. Nevertheless, we need not reach the issue.

{¶35} The trial court did not actually say that it did not consider the circumstantial evidence that Pastroumas presented. Further, we review the decision on a motion for summary judgment de novo, so any error by the trial court was harmless.

See Home Ins. Co. v. OM Group, Inc., 1st Dist. Hamilton No. C-020643, 2003-Ohio-3666, ¶ 5. Even considering all the evidence that Pastroumas had presented, he failed to show that UCL acted with deliberate intent to injure. Consequently, we overrule his first assignment of error.

V. Summary

{¶36} In sum, we find no merit in Pastroumas's two assignments of error. We hold that the trial court did not err in granting UCL's motion for summary judgment. Consequently, we overrule his assignments of error and affirm the trial court's judgment.

Judgment affirmed.

CUNNINGHAM, J., concurs
HENDON, J., concurs separately.

HENDON, J., concurring separately.

{¶37} The standard necessary to impose common-law liability on an employer for an intentional tort is, for all practical purposes, nearly impossible to meet. Absent a proverbial "smoking gun," how does one show that an employer specifically intended for an employee to suffer injury? *See Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶ 56.

{¶38} UCL was required to comply with various requirements imposed by ODOT, including the requirement that its platform/containment system must be prepared according to the drawings of a registered engineer. The platform and attached outriggers built by UCL failed to comply with the engineer's drawing. With full knowledge of the platform's noncompliance, UCL continued to use the platform, resulting in severe injury to Pastroumas. ODOT had prohibited its own employees from even climbing onto the platform until it was built to meet the engineer's

specifications. To argue that UCL was unaware that an injury was likely to occur would be disingenuous.

{¶39} Further demonstrating UCL's knowledge of the likelihood that an employee would suffer injury are the numerous OSHA violations that it had received prior to Pastroumas' injury. Specifically, UCL had received citations for failing to erect platforms that were designed by a registered engineer and for using inferior materials for the containment system.

{¶40} In my opinion, these facts impute knowledge onto UCL that an injury was "substantially certain" to occur. *See* R.C. 2745.01(A). But because "substantially certain" has been defined as having the specific and deliberate intent to cause injury, I am constrained to agree with the majority's opinion. *See* R.C. 2745.01(B); *Kaminski*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶ 56. Despite the egregious nature of these facts, there is no "smoking gun" indicating that UCL actually intended for Pastroumas to suffer injury.

Please note:

The court has recorded its own entry this date.